Supervalu, Inc. *and* Chauffeurs, Teamsters and Helpers, Local 26 affiliated with the International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 33–RC–4278

April 15, 1999

DECISION AND DIRECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections and challenges to an election held April 3, 1998, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 72 for and 70 against the Petitioner, with 10 challenged ballots, a sufficient number to affect the results of the election.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations,[2] and we shall remand this matter to the Regional Director to take such action consistent with this Decision and Direction.

Under well-established Board policy, an employee on sick or disability leave is presumed to be eligible to vote absent an affirmative showing that the employee has resigned or been discharged. See *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *Pepsi-Cola Co*, 315 NLRB 1322 (1995). In the instant case, we agree with the hearing officer that the Employer has failed to establish that employee Gary Robertson resigned or was discharged.[3]

Our dissenting colleague would abandon the Board's *Red Arrow* test, and instead apply the same "reasonable expectancy of return" test applicable to employees who are laid off. The Board, with court approval, has uniformly rejected the test proposed by the dissent. See *Pepsi-Cola Co.*, 315 NLRB 1322 (1995); *Associated Constructors*, 315 NLRB 1255 (1995); *Vanalco, Inc.,* 315 NLRB 618 (1994); *Thorn Americas, Inc.,* 314 NLRB 943 (1994); *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598 (3d Cir. 1996); *NLRB v. Newly Weds Foods*, 758 F.2d 4, 8 (1st Cir. 1985); and *Medline Industries, Inc. v. NLRB*, 593 F.2d 788 (7th Cir. 1979). Accordingly, we adhere to the settled and time-tested *Red Arrow* rule.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 33 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Steve Hodges, Roger Burke, Gerald Kocher, Walter Reid, Gary Robertson, James Robertson, Randy Endsley, and Stan Frerichs. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

MEMBER HURTGEN, dissenting in part.

My colleagues apply the test of *Red Arrow Freight Lines*, 278 NLRB 965 (1986), to find that a permanently and totally disabled employee is eligible to vote. The employee is on long-term disability, and his own physician has determined that he will "*never*" be able to return to work. Applying the *Red Arrow* test, my colleagues note that the employee has not been terminated and has not resigned. Thus, they find him eligible to vote. I respectfully disagree with the *Red Arrow* test. I would apply a test of whether there was a reasonable expectancy of return to the unit.[1] Because there was not such an expectancy, I would sustain the challenge.

Gary Robertson, a former truckdriver, has not worked since March 26, 1996, and has been on long-term disability since September of that year. He suffers from advanced emphysema, heart failure, coropulmonale, and severe exogenous obesity. He weighs 450 pounds. Robertson is not physically able to work as a truckdriver, and he will not be able to do so at any time in the future, according to his medical records. Robertson's physician testified as follows:

> Q. How long will the described limitations impair the patient?
>
> A. Lifetime
>
> Q. When do you expect a fundamental marked change in patient's condition?
>
> A. Never.

Robertson has never resigned, and, for beneficient reasons, the Employer has never discharged him. He is allowed to remain on the payroll to obtain disability benefits under the employer-provided health insurance plan.

Because, under the prevailing *Red Arrow* test, an employee on sick or disability leave is presumed eligible to vote unless he has resigned or been discharged, my colleagues find that Robertson is eligible. But the real issue is whether Robertson shares a community of interest with

[1] We agree with the hearing officer's finding that terminated employees Greer and Burchett had no reasonable expectation of recall as of the date they were informed by Transportation Manager Stigall that they were being taken off of the Employer's part-time driver recall list, and that they were ineligible to vote in the subsequent representation election. We rely on the hearing officer's implicit crediting of Stigall's testimony that he had removed their names because they had refused runs and that he had directed the dispatchers not to call them for work. We also rely on the hearing officer's finding that both Greer and Burchett were informed of their removal before the election. Accordingly, we affirm the hearing officer's recommendation to sustain the challenges to their ballots.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's overruling of the challenge to the ballot of employee Steve Hodges; the withdrawal of challenges to the ballots of employees Roger Burke, Gerald Kocher, Walter Reid, James Robertson, Randy Endsley, and Stan Frerichs; the withdrawal of all of the Employer's objections; and the overruling of all of the Petitioner's objections.

[3] Our dissenting colleague admits that Robertson has not resigned or been discharged. Whether or not the Employer's failure to discharge him is, as characterized by our colleague, "for beneficient reasons" is irrelevant. See *Pepsi-Cola*, supra.

[1] I agree with the dissent in *Vanalco, Inc.*, 315 NLRB 618 (1994).

the unit. In my view, that depends on whether he has reasonable expectancy of return. The record here establishes that he does not and that the *Red Arrow* test completely subverts the community of interest standard.

The "reasonable expectancy" test is a permissible construction of the Act and is preferable because it is a better measure of voter eligibility than the current *Red Arrow* test. There can be a myriad of valid reasons why a sick or disabled employee has not resigned or been discharged, even if there is no likelihood of his returning to the unit. Some of these reasons are practical; some, as here, are humanitarian. In essence, the *Red Arrow* test forces a Hobson's choice between (1) resignation or discharge; and (2) an extension of eligibility to someone who has no foreseeable likelihood of reestablishing ties to the other voters. I would not force that choice.

The "reasonable expectancy" test should apply whether an employee's absence from the workplace is necessitated by economic circumstances or by medical ones (i.e., employees on layoff, as well as those on sick leave). The record establishing Robertson's medical condition and his inability to return to his job as a truck-driver exposes a serious infirmity in the *Red Arrow* test. Employees on sick leave who have no reasonable expectancy of returning to work, such as Robertson, do not share a community of interest with those who are actively employed.

The "reasonable expectancy of return" test has long been used by the Board for employees laid off for economic reasons, and no insuperable difficulties have been encountered. Concededly, an economic layoff involves economic issues, while the instant case involves medical ones. But, the burden of proof is on the party opposing eligibility. Thus, to the extent that the medical evidence is in serious conflict, it may be that the burden is not met. But where, as here, the medical evidence is clear and unrebutted, and shows no reasonable expectancy of return, the employee should not be eligible, for he has no community of interest with the unit employees. Indeed, as noted by the circuit court in a case cited by my colleagues:[2]

> We recognize that there may be instances in which it may be clear from objective factors that an employee who has been out for medical reasons no longer retains the requisite community of interest, notwithstanding the failure of either party to communicate that termination of employment. [Id. at 607.]

Finally, my colleagues say that the courts have approved the Board's rejection of the "reasonable expectancy of return" test. In truth, the courts have simply held that the Board has acted within its broad range of discretion.[3] The courts have thus made it clear that the Board is free to adopt a different test. Therefore, the courts have not rejected the "reasonable expectancy of return" test.

In sum, I would allow ineligibility to be shown by termination, resignation, *or other facts establishing that there is no reasonable expectation of return.* On the facts, I would sustain the challenge to Robertson's ballot.

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[2] *Calvert Acquisition Co. v. NLRB*, 83 F.3d 598 (3d Cir. 1996).

[3] See, e.g., *Calvert Acquisition*, supra; *Newly Wed Foods*, 258 F.2d 4 (1st Cir. 1985).